

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VICTOR HUGO HERNANDEZ-PEREZ,

Defendant-Appellant.

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UNPUBLISHED

June 16, 2011

No. 297917

Kent Circuit Court

LC No. 09-012523-FH

Before: SHAPIRO, P.J., and O'CONNELL and OWENS, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from his plea-based conviction of unlawful imprisonment, MCL 750.349b, for which he was sentenced to four to 15 years in prison. We remand to allow defendant to withdraw his plea.

At the plea hearing, the trial court stated:

If you take advantage of the prosecutor's offer, even though the maximum sentence is 15 years, the worst that can happen to you is one year in the county jail.

If you choose to go to trial, which is your right, and if you are found guilty, then you'll be doing more than a year in the county jail. You could be serving as much as—over five years in prison, a minimum sentence of more than five years to a maximum of 15 years.

Subsequently, the court explained that it was not making any bargain or agreeing to any particular sentence, but stated that if defendant was not “hiding something about [his] past”, had “told all the truth”, and did not “have a criminal record”, his sentence would be for no more than one year in jail.

*In People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993), our Supreme Court held:

At the request of a party, and not on the judge's own initiative, a judge may state *on the record* the length of sentence that, on the basis of the information then available to the judge, appears to be appropriate for the charged offense.

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The judge's preliminary evaluation of the case does not bind the judge's sentencing discretion, since additional facts may emerge during later proceedings, in the presentence report, through the allocution afforded to the prosecutor and the victim, or from other sources. However, a defendant who pleads guilty or nolo contendere in reliance upon a judge's preliminary evaluation with regard to an appropriate sentence has an absolute right to withdraw the plea if the judge later determines that the sentence must exceed the preliminary evaluation. [*Cobbs*, 443 Mich at 283 (footnote omitted).]

It is undisputed that defendant has no criminal record. The presentence investigation report (PSIR) indicates that defendant's two children were also allegedly placed in physical danger and that they were also "abducted" when defendant unlawfully imprisoned his ex-girlfriend. However, it was known at the time defendant entered his plea that the two children were present during the entire episode. The involvement of defendant's sister and/or father in the incident was also known. Thus, defendant had disclosed all the facts, and appears to have been misled about the ramifications of pleading guilty. We note that defendant needed an interpreter, and it is likely that this may have complicated his understanding of what was being said. In any event, statements on the record relative to the length of defendant's sentence more than likely led him to believe that it was a preliminary evaluation to which he would be entitled if he entered his plea. Thus, defendant must be afforded the opportunity to withdraw his plea.<sup>1</sup>

Defendant also argues that OV 9, OV 13, MCL 777.43, and OV 14, MCL 777.44, were improperly scored. Defendant objected to the scoring of these variables at sentencing and thus preserved the issue. MCL 769.34(10). When the minimum sentence is within the range provided by the statutory sentencing guidelines, we must affirm unless the trial court erred in scoring the guidelines or relied on inaccurate information. MCL 769.34(10); *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000). In *People v Steele*, 283 Mich App 472; 769 NW2d 256 (2009), this Court stated:

This Court reviews a trial court's scoring decision under the sentencing guidelines "to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005) (citation omitted). A trial court's scoring decision "for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). This Court reviews "de novo as a question of law the interpretation of the statutory sentencing guidelines." *Id.* [*Steele*, 283 Mich App at 490.]

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<sup>1</sup> We reject defendant's argument that he is entitled to specific performance of his plea. *Cobbs* indicates that the remedy should be an entitlement to withdraw the plea. *Cobbs*, 443 Mich at 283.

Defendant's children were in the vehicle at the time defendant threatened his former girlfriend, the children's mother, with a knife. Offense Variable 9 was scored at ten points on the ground that there were "2 to 9 victims who were placed in danger of physical injury or death." See MCL 777.39. The children were in the vehicle when defendant pointed the knife at his former girlfriend, and the children certainly would have been "placed in danger of physical injury" had defendant actually attacked his former girlfriend or had she attempted to escape while the vehicle was in motion. See, e.g., *People v Kimble*, 252 Mich App 269, 274; 651 NW2d 798 (2002), aff'd 470 Mich 305; 684 NW2d 669 (2004) (three persons who were in vehicle with intended shooting victim were also placed in danger). The scoring of OV 9 at ten points was supported by the requisite evidence.

Offense Variable 13 was scored at 25 points based on the offense being part of "a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43. We note that "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." *Id.* Here, defendant committed a felonious assault when he used a knife to threaten his former girlfriend and frighten her so that she would come with him to Kansas. See *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); MCL 750.82. Although defendant was not so charged, this act could be counted in scoring OV 13. Moreover, defendant's actions at least with respect to his former girlfriend satisfied the elements of kidnapping. See MCL 750.349(1)(d), (4). This act could be counted for purposes of scoring OV 13. We conclude that the scoring of OV 13 at 25 points was supported by the requisite evidence.

We find no error with the scoring of ten points for OV 14 based on evidence that defendant was the leader in a multi offender situation. MCL 777.44. The PSIR indicates that defendant's sister was involved in defendant's effort to take his former girlfriend and their children to Kansas. Thus, it appears defendant's sister aided and abetted him in the commission of this crime. See MCL 767.39. She therefore could be viewed as "an offender" and defendant could be viewed as the "leader" in the commission of this crime. The scoring of OV 14 was supported by the requisite evidence.

We remand this case to the trial court with instructions that defendant be afforded the opportunity to withdraw his plea.

Remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro  
/s/ Peter D. O'Connell  
/s/ Donald S. Owens